HABEAS CORPUS IN THE COLONIES

THE writ of habeas corpus has been regarded as one of the important safeguards of personal liberty, and the struggle for its possession has marked the advance of constitutional government. Magna Charta, Darnel's Case, the Petition of Right, the Bill of Rights and the Habeas Corpus Act bear witness to the importance of the struggle. Our rights at the present day therefore depend upon those acquired by our English forefathers as transmitted to the colonies, which are the connecting link in the process. Hence it is essential that we should know what rights the colonists possessed.

The ordinary conception is that the colonies did not have habeas corpus until it was given to them by England itself, and Queen Anne generally receives the credit for thus graciously extending the privileges of the writ. This idea rests primarily upon the statement of Chalmers. In speaking of Virginia he says that Spotswood, the new Governor, "was received by the Virginians with acclamations, because he had brought them liberty. Influenced by her new advisers, who had been, however, honored with colonial hatred, the Queen gave unsolicited to the provincials the invaluable benefit of the habeas corpus act, which had been denied by the late ministers."[1] This statement applied only to Virginia, and yet the impression seems to be general that the benefit was conferred upon the other colonies as well. It is doubtful if this so-called extension of the writ of habeas corpus really gave the Virginians much more than they already possessed. Just what was granted depends upon Spotswood's proclamation, which up to the present has not been printed. It will appear below; but before examining the document, it will be necessary to consider just what the writ of habeas corpus is, and what its status was in the other colonies.

The writ of habeas corpus is issued by a court of law or equity, and commands that the body of the prisoner be produced before the court, in order that it may inquire into the cause of imprisonment or detention. Consequently it is meant for the protection of personal liberty and is properly known as the writ of *habeas corpus ad subjiciendum*. Although there are other writs of habeas corpus, yet this is the one which holds the high place in history. The thought underlying the writ depends upon early Saxon conceptions

[1] George Chalmers, *Introduction to the Revolt*, I. 395.

of individual right, and is fully expressed in the Magna Charta, which says that no free man shall be "taken or imprisoned or dispossessed, or outlawed, or banished . . . except by the legal judgment of his peers or by the law of the land."[1] This clause against arbitrary imprisonment was a formal expression of what already existed in the common law. Just when writs of this sort began to issue at common law is uncertain, but by the fifteenth century they were fully recognized.[2] In the strife of the seventeenth century between the powers of the King and the rights of the people, habeas corpus is frequently appealed to. These demands finally culminated in the Habeas Corpus Act of 1679, which provided for the effective application of the writ. It should be noticed that the law did not grant anything new; that it did not make habeas corpus, but merely made efficient a writ, which was recognized as already existing. The common law nature of the writ has been recognized by English and American courts,[3] and it is a fair question whether our rights depend upon the common law or upon the statute of Charles II. Certainly it is worth inquiring whether the writ of habeas corpus extended to the colonies by common law or by statute law.

This question is answered in the opinions of the law officers of the English Crown, and in the rulings of the court. In 1720 Mr. West gave an opinion on the extension of the common law to the colonies, in which he said:

"The Common Law of England is the Common Law of the Plantations, and all statutes in affirmance of the Common Law passed in England antecedent to the settlement of the colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes made since those settlements are there in force unless the colonists are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear."[4]

In 1729 the Attorney-General Yorke gave an important opinion upon the statute law in the following words:

"I am of opinion that such general statutes as have been made since the settlement of Maryland, and are not by express words located either to the plantations in general or to the Province in particular, are not in force there, unless they have been introduced and declared to be laws by some Acts of Assembly of the Province, or have been received there by long uninterrupted usuage or practice."[5]

These famous opinions clearly state that the common law of England becomes *ipso facto* the common law of the colonies, and

[1] Magna Charta, Section 39. G. C. Lee, *Source-book of English History*, 175.
[2] W. S. Church, *A Treatise on the Writ of Habeas Corpus*, 3–4.
[3] McAll, I, 71, 72. Also *Md. Reports*, XXXVIII. 203.
[4] George Chalmers, *Opinions* (Colonial), 206.
[5] *Ibid.*, 208.

that all statutes affirming the common law passed antecedent to the foundation of the colonies also extend thither. No statute laws made since the settlement would extend to the plantations unless they were especially mentioned, or unless they had been adopted by special legislation of the colonies, whose freedom in this respect was limited by the fact that most of their laws required the approval of England. Usage, precedent and practice were mightier forces than legislation, in extending English law; and the Attorney-General recognized this truth. There is little doubt that a much larger number of English statutes were applied in the colonies than would have been adopted in form had they been submitted to the provincial assemblies. This is explained by the fact that many of the colonial lawyers received their training in England, where they imbibed both statute law and common law.[1]

The distinction between the common law and the statute law should be kept clear, for many difficulties will thus be cleared away. Even Chalmers had a tendency to confuse the two, for in speaking of the common law he says that the colonists did not know the benefits of the writ of habeas corpus.[2] In another place, speaking of the Habeas Corpus Act of Massachusetts, he maintains that it was unnecessary, evidently thinking of the common law.[3] The distinction between the two has been carefully upheld by the courts, which have asserted in so many words that our forefathers brought the common law writ of habeas corpus to this Country.[4] The question arises which are the statutes upon the subject and do they apply to America?

The great English statute is that of Charles II., which is known as "An Act for the better securing the liberty of the subject and for the prevention of imprisonments beyond the seas."[5] It was passed in 1679 by rather doubtful means, if the story of Burnet is to be believed. In the preamble it is asserted that there had been great delays on the part of sheriffs and jailors in making returns to writs of habeas corpus for men imprisoned for criminal or supposed criminal matters. Consequently it was enacted that when such a writ was served upon the sheriff or jailor, or upon any of their under officers they should within three days bring or cause to be brought the body of the prisoner before the judge issuing the writ, unless the warrant of commitment was for treason or felony. A fine of five hundred pounds was laid upon the judge for failure to grant the

[1] See N. J. (Coxe), I. 389, foot-note. Dall, I. 75.

[2] G. Chalmers, *Political Annals of the Present United Colonies*, I. 678.

[3] *Ibid. New York Historical Society Collections for 1868*, 113.

[4] See McAll, I. 70 ff.

[5] *Statutes of the Realm*, V. 935.

writ, while the jailor forfeited a hundred pounds for not making a return. This law was made to apply to any county palatine, to the Cinque Ports, and other privileged places within England, Wales, Berwick on Tweed, and the islands of Jersey and Guernsey. Persons charged with debt or civil action were excluded from the benefits of the act, while the criminal class was limited by the treason and felony clause. Lecky says that before the Revolution of 1688 there were only fifty capital offenses upon the statute book, but the number was increased until in 1770 it was estimated in Parliament that such crimes numbered one hundred and fifty, while Blackstone says that at that time they equalled one hundred and sixty. In 1786 it was said that the number had increased.[1] Felonious crimes tended to increase in number throughout the eighteenth century, and hence the Habeas Corpus Act was greatly limited. It is important only as marking the beginning of efficient legal protection for individual liberty, but its power grew as the terms "felony" and "treason" were limited in their meaning.

This statute, which is now considered to be one of the fundamentals of English liberty, makes no mention of the colonies. Hence, according to the opinions already cited, it did not extend to the plantations; and further testimony bears out the same conclusion. When the Charter of Liberties of New York came before the committee of trade and plantations, March 3, 1684, it contained the following clause: "That the Inhabitants of New York shall be governed by and according to the Laws of England." The committee observed that "This Privilege is not granted to any of His Ma[ts] Plantations where the Act of habeas corpus and all such other Bills do not take Place."[2] In 1692 Massachusetts passed a Habeas Corpus Act, which was practically a copy of the English act. Three years later this came before the Privy Council, which disallowed it: "Whereas . . . the writt of Habeas Corpus is required to be granted in like manner as is appointed by the Statute 31 Car. II. in England, which priviledge has not as yet been granted to any of His Maj[tys] Plantations, It was not thought fitt in His Maj[tys] absence that the said Act should continue in force and therefore the same is repealed."[3]

These quotations only strengthen the opinions first given and prove that the Habeas Corpus Act did not extend to the colonies; but they do not prove that the colonists failed to enjoy the writ, as will be seen from an examination of the conditions in the various colonies.

[1] W. E. H. Lecky, *A History of England in the 18th Century*, VI. 246.

[2] *Documents Relating to the Colonial History of New York*, III. 357.

[3] *Acts and Resolves of the Province of Mass.*, I. 99.

We have already noticed that in Massachusetts a Habeas Corpus Act was passed in 1692 which lasted for three years before it was repealed. This act, like that of England, laid heavy fines on both judge and jailor for the nonfulfilment of its provisions, and it also provided that even in cases of treason and felony the person should be released unless indicted at the next term of court.[1] There is evidence that before this Massachusetts was alive to the importance of legal protection, for we find a paper in the handwriting of Cotton Mather (probably written in 1686 before the arrival of Andros), in which he says that they were slaves without the Habeas Corpus Act, and that agents by their solicitations might get it allowed to them; that now was the time to strive for it.[2] This warning was needed, for in 1689 we find Judge Dudley arbitrarily refusing a writ of habeas corpus to a Mr. Wise.[3] There is nothing in the incident, however, to indicate that there was anything new in the asking for such a writ. That it must have been a common practice is also shown by Samuel Sewall, for he speaks in his *Diary*, Dec. 11, 1705, of issuing a habeas corpus.[4] This is especially interesting, for it was issued after the Massachusetts act was repealed and shows that the writ did not depend upon any statute law.

In New Hampshire, August 5, 1684, there was an application for a writ of habeas corpus by a Mr. Vaughan, who asked for it according to the statute commonly called the Habeas Corpus Act of 31 Charles II.[5] A writ seems to have issued and an examination followed which resulted in the return of the prisoner to the jail. This was a case of arbitrary imprisonment growing out of a quarrel with the governor.

New York in 1690 had an interesting case resulting from the Leisler rebellion. To this writ of habeas corpus an insufficient return was made, and we find the bystanders hissing the court, which clearly shows the common ideas regarding the rights of habeas corpus.[6] Here again there is nothing to indicate that the issuance of the writ was anything extraordinary. In the court laws there are some indications of habeas corpus, and these, together with the bail laws, formed the only strictly legal protection for personal liberty.

William Pinhorne, a New Jersey judge, refused to grant a writ of habeas corpus to Thomas Gordon, the speaker of the assembly.

[1] For the act itself see the above, p. 95.

[2] *Mass. Historical Society Collections*, Series 4, VIII. 390.

[3] W. S. Church, *A Treatise on the Writ of Habeas Corpus*, 35.

[4] *Mass. Historical Society Collections*, Series 5, VI. 147.

[5] *Provincial Papers*, edited by Nathaniel Bouton, I. 542.

[6] *Docs. Relating to Colonial History of N. Y.*, III. 680.

The latter was kept in prison fifteen hours and then was only released to bail upon an application made by a lawyer, who was the son of the judge.[1]

Pennsylvania made provision for the issuing of writs of habeas corpus in the various court laws. Although these were repealed frequently in England, yet they were again and again re-enacted. In the laws of 1682 provision was made that any one unlawfully imprisoned should have double damages against the informer or prosecutor. This was abrogated in 1693, but was re-enacted the same year.[2] It was upon such acts that the legal protection of the Pennsylvanians depended.

One of the most interesting bits of colonial legislation was that of South Carolina, which passed an act in 1692 empowering the magistrates to "execute and put in force an Act made in the Kingdom of England, Anno 31, Caroli 2, Regis, commonly called the Habeas Corpus Act."[3] McCrady says that this act was disallowed by the proprietors on the ground that it was unnecessary as the laws of England applied to the colony.[4] The act seems to have been enforced despite the decision of the proprietors, for we find that the act of 1712 repealed in so many words that of 1692. The new law of 1712 provided that any two of the lords proprietors deputies, or the chief justice of the province, or any one of the lords proprietors deputies and one of the justices of the peace, or any two of the justices of the peace could put in execution the Habeas Corpus Act as "fully, effectually and lawfully as any Lord Chancellor, Lord Keeper, or any of Her Majestie's Justices, either of the one Bench, or the Barons of the Exchequer."[5] This laid an extraordinarily heavy fine of five hundred pounds for the failure to execute the act. It also held that "all and every person which now is or hereafter shall be within any part of this Province, shall have to all intents, constructions and purposes whatsoever, and in all things whatsoever, as large ample and effectual right to and benefit of the said act, commonly called the Habeas Corpus Act, as if he were personally in the said Kingdom of England."[5] This statute remained the law of South Carolina through the first quarter of the nineteenth century, and it is a good illustration of the difference between the laws of the various colonies. That South Carolina was more fortunate than Massachusetts may be explained by the fact that the law of the former might not have been submitted to England.

[1] Samuel Smith, *Hist. of the Colony of N. J.*, 391.

[2] *Charters to William Penn and Laws of the Province of Pa., 1682–1700*, 100.

[3] *Statutes of S. C.*, edited by Thomas Cooper, II. 74.

[4] Edward McCrady, *History of South Carolina, 1670–1719*, 247–248.

[5] *Statutes of S. C.*, II. 399.

In Virginia the legal protection for individual liberty rested upon the bail law of 1645[1] until the famous extension of the Habeas Corpus Act by Queen Anne. This was embodied in the instructions given to Governor Spotswood, and by him was set forth in the following proclamation, of which a transcript was made from the Virginia Records for this article.

"At a court held in Virginia for the county of Henrico the fifth day of October 1710.

"Virginia SS

"By the Hon ble the Lieut Governor

"A Proclamation.

"Whereas her Majesty out of her Royal grace and favour to all her Subjects of this her Colony and Dominion hath been pleased by her Instructions to Signify unto me her Royal Will and pleasure for preserving unto them their legal Rights and propertys which said Instructions are as followeth. Whereas We are above all things desirous that all our Subjects may enjoy their legal Rights and Properties, You are to take especial care that if any person be committed for any Criminal matters (unless for Treason or felony plainly and especially expressed in the Warrant of Commitment) he have free liberty to petition by himself or otherwise the chief Barron or any one of the Judges of the common pleas for a writt of Habeas Corpus which upon such application shall be granted and served on the Provost Marshall Goaler or other Officer having the Custody of such prisoner or shall be left at the Goal or place where the Prisoner is confined and the said Provost Marshall or other Officer Shall within three days after such service (on the petitioners paying the fees and charges and giving Security that he will not escape by the way) make return of the writt and Prisoner before the Judge who granted out the said Writt and there certify the true cause of the Imprisonment and the said Baron or Judge shall discharge Such prisoner taking his Recognizance and Suretys for his appearance at the Court where the offence is cognizable and certify the said Writt and recognizance into the Court unless Such offences appear to the said Barron or Judge not Bailable by the law of England And in case the said Barron or Judge shall refuse to grant a Writt of Habeas Corpus on view of the copy of Commitment or upon Oath made of Such copy having been denyed the Prisoner or any person requiring the same in his behalf or shall delay to discharge the Prisoner after the granting of such Writt the said Barron or Judge shall incur the forfeiture of his place. You are likewise to declare our pleasure that in case the Provost Marshall or other officer shall imprison any person above twelve hours except by a Mittimus Setting forth the cause thereof he be removed from his said Office. And upon the application of any person wrongfully committed the Barron or Judge shall issue his warrant to the Provost Marshall or other officer to bring the Prisoner before him who shall be discharged without Bail or paying fees And the Provost Marshall or other officer refusing obedience to Such Warrant Shall be thereupon removed and if the said Barron or Judge denys his warrant he Shall likewise incur the forfeiture of his place. You Shall give directions that no prisoner being Sett at large by an Habeas Corpus be recommitted for the Same offence but by the Court where he is bound to

[1] W. W. Hening, *Virginia Statutes*, I. 305.

appear and if any Barron or Judge Provost Marshall or other Officer contrary hereunto shall recommit such person so bailed or delivered You are to remove him from his place And if the Provost Marshall or other Officer having the Custody of the Prisoner neglects to return the Habeas Corpus or refuses a copy of the Commitment within Six hours after demand made by the Prisoner or any other in his behalf shall likewise incur the forfeiture of his place And for the better prevention of long imprisonments You are to appoint two Courts of Oyer and Terminer to be held yearly Viz.[t] On the Second Tuesday in December and the Second Tuesday in June the charge whereof to be paid by the Publick Treasury of our said Colony not exceeding £100 each Session. You are to take care that all Prisoners in cases of Treason or Felony have the liberty to petition in open Court for their Tryals that they be Indicted at the first Court of Oyer and Terminer unless it appears upon Oath that the Witnesses against them could not be produced and that they be tryed the Second Court or discharged And the Barron or Judge upon motion made the last day of the sessions in open Court is to bail the Prisoner or upon the refusal of the said Barron or Judge and Provost Marshall or other Officer to do their respective Dutys herein they Shall be removed from their places. Provided always that no person be discharged out of Prison who Stands committed for debt for any Decree of Chancery or for any legal proceedings of any Court of Record. And for the preventing any exactions that may be made upon Prisoners You are to declare our pleasure that no Barron or Judge shall receive for himself or Clerks for granting a Writt of Habeas Corpus more than two Shillings Six pence and the like sum for taking a Recognizance and that the Provost Marshall shall not receive more than five Shillings for every commitment one Shilling three pence for the bond the Prisoner is to Sign one Shilling three pence for every copy of a Mittimus and one Shilling three pence for every mile he bringeth back the Prisoner. In obedience to her Majestys Commands and to the intent that all her subjects may be fully informed how much they owe to her Majestys Royal favour for these her gracious Concessions I Alexander Spotswood Esqr. her Majestys Lieut. Governor of her Colony and Dominion of Virginia have thought fit by and with the advice of her Majestys Council to issue this my Proclamation hereby commanding in her Majestys name the Sheriffs of the respective Countys within this Colony to cause this Signification of her Majestys will and pleasure to be openly read and published at the Court houses of their respective Countys at the next Court after the receit hereof. And I do further with the advice aforesaid require and command the Justices of the respective County Courts to cause the Same to be Registered in the Records of their Said Countys and to observe these her Majestys Commands as they will answer the contrary at their perill Given at Williamsburgh under my hand and the Seale of the Colony this 6th day of July 1710 in the nineth year of her Majestys Reign.

"God Save the Queen.

"A SPOTSWOOD.

"The afore written Proclamation was ordered to be Recorded and it is accordingly Recorded.

"Teste William Randolph, Cl. Cur."[1]

[1] This is certified as a true transcript: "A true transcript from the record, 1902 Jany. 10.—Samuel P. Waddin."

We are now led to inquire concerning the extent of the grant made by this proclamation. In the first place, the legality of the whole proceeding might be questioned, for the instruction was in the nature of a legislative act, whereby the Crown extended an act of Parliament to the colonies. It may well be doubted if the Crown in 1710 possessed any power of this kind, but putting that aside we notice that the only punishment for the failure to carry out the provisions set forth was the removal of the judges, which would depend for its effectiveness upon the governor. This was no special protection against an arbitrary governor. Then again there was the limitation that no one could be discharged if the offenses appeared to be not bailable by the laws of England. Such a clause practically placed the whole thing at the discretion of the judges, who were appointed by the governor. In striking contrast to the feebleness of these penalties, is the English Habeas Corpus Act, which inflicted very heavy fines for failure in execution, and these fines became operative at once on the committing of the offense. The proclamation followed the English law in excluding those held for debt, and added that one held for any decree of chancery, or for any legal proceeding of a court of record should not be released. This addition comes under civil offenses and so is a practical following of the law of England.

Thus Virginia received by questionable means the outward forms of the great Habeas Corpus Act of Charles II., but the effectiveness of the law was greatly hindered by the bail provisions, which placed the whole matter at the discretion of the judges. The Virginians were apparently content to live under the protection so given, for they attempted nothing else till 1736, when they passed a law providing for the use of habeas corpus in cases of civil action. Such legislation anticipated the action of the mother country by nearly a century.

In conclusion, it may be added that the rights of the colonists as regards the writ of habeas corpus rested upon the common law with the exception of South Carolina, which re-enacted the English statute. The lack of statute law did not mean that the colonists had no protection for their personal rights, for the want was supplied by the common law, and also by the placing of habeas corpus provisions in their court laws. Then too they passed very strict bail laws with heavy penalties for their nonfulfilment. Still another protection is to be found in the strong public opinion, so well shown in the hissing of court officers for making insufficient returns. In the majority of the colonies formal habeas corpus acts were not passed until after the American Revolution, when they were free

from any hindrance on the part of England. In their legislation, however, there was no violent departure from the law of England, which showed the close relation felt by the colonists in the common inheritance of the English law.

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